

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 08/31/07

ATOMIC SAFETY AND LICENSING BOARD

SERVED 08/31/07

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

August 31, 2007

MEMORANDUM

The Pre-License Application Presiding Officer (PAPO) Board wishes to alert the Commission to the very real possibility of significant delays in the High-Level Waste (HLW) proceeding because of the months it will take potential parties to the proceeding to gain access to safeguards information (SGI).

At the Board's May 2007 case management conference, the NRC Staff informed the Board that the process for investigating and evaluating a potential party or expert for entitlement to access SGI will take the Staff between four and six months for citizens, and an indeterminately longer time for foreign nationals.¹ The expenditure of four to six months to accomplish the relatively straight-forward tasks of determining whether an individual may

¹ Case Management Conference Tr. at 1126, 1169 (May 23, 2007). In its recent posting of proposed procedures for comment on the agency website, the Staff reiterates its four to six month estimate. Availability for Comment of Proposed Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information (July 31, 2007) at 5 n.7, ADAMS Accession No. ML071910149.

access SGI has the potential to delay the HLW proceeding and will act as a constant irritant to meeting planned schedules. There appears to be a readily available alternative method that consumes much less time and is far more compatible to the scheduling demands of the HLW proceeding. See 42 U.S.C. § 10134(d).

Over the course of the HLW proceeding, there are likely to be significant components of the license application, such as the security plan and its supporting documentation, that contain SGI.² If the NRC Staff turns down an individual for SGI access and the dispute resolution process specified in the proposed 10 C.F.R. § 2.1010(b)(6)(i)(D) is used, another forty days will likely be added to the four to six month period.³ At the very least, some individuals will not be cleared to gain access to SGI by the time the license application is submitted or for some time afterwards, making extensions to the deadlines for filing contentions or the subsequent admission of new or amended contentions likely. As more SGI material is submitted and created in the months and years to come, such a long time-lag will continue to create problems and delays.

The NRC Staff's Current Plan for SGI Access

Under the Commission's proposed rules, a background check and fingerprint review, leading to a determination of trustworthiness and reliability, are required in order for potential parties to access SGI.⁴ Background checks involve the investigation and verification of the

² As of the last case management conference, there were only twenty-one documents containing SGI in the Department of Energy (DOE) collection and none in the NRC Staff's collection. Case Management Conference Tr. at 1200. This number is expected to increase as DOE and NRC add more material to the LSN. The number of potential parties and experts that will seek access to SGI is also unknown; presumably, as the number of documents containing SGI increases so does the likelihood that they will be needed by potential parties.

³ 71 Fed. Reg. 64,004, 64,056 (Oct. 31, 2006).

⁴ See id. at 64,061-62 (Proposed 10 C.F.R. § 73.22(b)(1)-(2)).

information provided on Standard Form (SF) 85 and a credit check.⁵ Pursuant to an interagency agreement, the NRC Staff plans to use the Office of Personnel Management (OPM) to conduct the background checks, credit checks, and fingerprint reviews.⁶ The NRC Staff will then make the trustworthiness and reliability determination based upon the results of those checks and reviews, as well as the need to know determination.⁷ The Staff charges a fee of \$172.50 to cover the costs of these investigations.⁸

The Staff estimates it will usually take OPM between three and five months to conduct the background check for U.S. citizens.⁹ Checks for foreign nationals will take longer.¹⁰ If OPM does not complete the background check within a particular period, the Staff has no resort except to "contact OPM and attempt to resolve the delay at the staff level."¹¹ At the case management conference, the Staff informed us that the NRC-OPM interagency agreement

⁵ Case Management Conference Tr. at 1144. The SF-85 requires that the applicant supply three references and furnish information regarding employment, residences, education, and illegal drug use. Id. at 1143-44; [OPM] SF-85, Questionnaire for Non-Sensitive Positions (Revised September 1995).

⁶ NRC Staff Response to PAPO Board Questions Dated July 6, 2007 (July 31, 2007) at 3, 4-5, 11 (Attached as Appendix A) [hereinafter NRC Staff Response to Questions].

⁷ Id. at 7. See also 71 Fed. Reg. at 64,061-62 (Proposed 10 C.F.R. § 73.22(b)). The Staff has estimated that it will take between twenty and thirty days to make the trustworthy and reliability determination. See Tr. at 1164-65; NRC Staff Response to Questions at 7. This memorandum does not address the time involved in making this or the need to know determination.

⁸ Case Management Conference Tr. at 1145.

⁹ Id. at 1166.

¹⁰ NRC Staff Response to Questions at 9-10. The Board has been informed by the State of Nevada that two citizens of the United Kingdom have been employed by the State of Nevada as experts, and likely will apply for SGI access. See State of Nevada Answer to PAPO Question 4.a (July 17, 2007) at 1.

¹¹ NRC Response to Questions at 12. The NRC Staff also wrote that SF-85 background investigations "cannot be expedited," and that, under their agreement, "the NRC cannot prioritize any non-expedited checks being performed by OPM." Id. at 13.

contains neither "any provision requiring that background checks be performed in a specified amount of time" nor "any enforceable benchmarks."¹²

The Staff also plans on using OPM for the fingerprint reviews.¹³ OPM will then send the fingerprints to the FBI and the NRC Staff will receive the results from OPM forty days later.¹⁴

The Staff, DOE, and the State of Nevada suggested in their joint proposed Third Case Management Order that the trustworthiness and reliability determination for SGI access be based only upon a fingerprint check, rather than a fingerprint and background check.¹⁵ While this remains the current state of the governing regulations,¹⁶ the Commission has been clear in the proposed rule that a background check should also be required for SGI access.¹⁷ Thus, the Board does not believe it is appropriate to order a process requiring a fingerprint check when it is likely to be superseded by the more stringent requirements of the imminent final rule. Moreover, to allow initial access to SGI based only upon a fingerprint review will create the difficult situation whereby the NRC Staff may feel constrained to seek to recapture the SGI already distributed after the final rule is promulgated.

Nor is the NRC Staff's suggestion that potential parties seeking access to SGI should complete the required paperwork as soon as possible, even in advance of the DOE certification of its document collection on the Licensing Support Network, a practical solution during the pre-application discovery phase. The Staff has yet to develop the standards and criteria it will apply

¹² Id.

¹³ See NRC Staff Response to Questions at 4, 6; Case Management Conference Tr. at 1140-41.

¹⁴ Case Management Conference Tr. at 1141.

¹⁵ [Joint Proposed] Third Case Management Order (Dec. 19, 2005) at 11.

¹⁶ See 10 C.F.R. §§ 73.21(c), 73.57(a).

¹⁷ See 71 Fed. Reg. at 64,061-62 (Proposed 10 C.F.R. § 73.22(b)(1)-(2)).

in making trustworthy and reliability determinations.¹⁸ Without such standards and criteria in place and made public, the Board is understandably loath to subject any potential party (and especially experts) to the profound harm to one's reputation and career associated with being turned down for such SGI access (i.e., not being found trustworthy and reliable). Moreover, even if it had in hand completed SGI access applications, the Staff has informed the Board that the NRC Office of Administration would not make any determinations until standards and criteria are in place.¹⁹ Even after such standards and criteria are developed and the final SGI rule issued, other problems remain. As a practical matter, it may be not be possible for a potential party to predict in advance the kind of technical experts it will need to review SGI material. The early submittal process also might lead to applications by individuals who ultimately do not need access to SGI, which will both further slow the process and unnecessarily drain NRC resources.

An Alternative to the Staff's Current Plan

In the view of the Board, there is a much more expeditious and efficient way for the agency to conduct background checks for the purpose of determining whether an individual is trustworthy and reliable and, if there is a demonstrated need to know, may have access to SGI. In this regard, the Board recently received answers from the NRC Staff and the Nuclear Energy Institute (NEI) to its questions addressing the conduct of the background investigations required by 10 C.F.R. § 73.56(b)(2)(i) for individuals who will have unescorted access authorization at a licensee's facility.²⁰ The Commission has said that these background investigations "are

¹⁸ See Case Management Conference Tr. at 1158.

¹⁹ Id. at 1158-59.

²⁰ See NRC Staff Response to Questions; Response of the Nuclear Energy Institute to the Board's July 6, 2007 Order (July 30, 2007) at 3 (Attached as Appendix B) [hereinafter NEI Response to Questions].

arguably more comprehensive" than the background checks for SGI.²¹ Licensees use approximately fifteen different private companies for the background checks and use the NRC to forward fingerprints to the FBI.²² Licensees do this background check in a far shorter period of time than similar OPM checks.²³ According to NEI:

It generally takes three to five days [for Licensees] to complete all of the elements of background investigations for a new employee. Employment history and reference checks performed in verifying an individual's character and reputation typically control the total time necessary to complete an investigation. Other aspects are typically completed within 72 hours.²⁴

For foreign nationals, NEI states that background investigations take only slightly longer: seven to nine days.²⁵ According to NEI, the fingerprint review portion of the inquiry conducted by the NRC and the FBI is generally completed within 72 hours and often within 12 hours.²⁶ In its response to the Board's questions, the Staff estimates that, if the NRC used a private contractor for the background checks, "it is possible that the investigative portion could be completed in two weeks."²⁷ These time periods, none more than two weeks, stand in stark contrast to the many months it takes OPM to conduct the same background checks.

The Staff's primary reason for using OPM appears to be that there already exists an interagency agreement for the NRC to use OPM for such services.²⁸ In order to use a private

²¹ 71 Fed. Reg. at 64,012.

²² See NEI Response to Questions at 3.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ NRC Staff Response to Questions at 15.

²⁸ See id. at 11.

contractor, akin to the fifteen used by NRC licensees,²⁹ the Staff would have to put a new contract in place – a process it estimates could be compressed to no less than four months.³⁰ According to the Staff, sending fingerprints directly to the FBI rather than channeling them through OPM would cost an extra \$27 per person.³¹

Although the Board has not definitively researched the issue, it does not appear that there is any legal bar to the Commission using a private contractor to conduct background investigations for SGI access. By law, the Commission must use OPM to investigate every person seeking to access restricted data from the Commission, see Atomic Energy Act, Section 145b, 42 U.S.C. § 2165(b), and federal regulations give OPM general responsibility for investigating the suitability of persons for federal employment.³² There appears, however, to be no such statutory or regulatory restriction regarding access to SGI or the investigations of non-employee potential litigants to agency administrative proceedings that seek access to SGI. Similarly, NRC Personnel Security Program Management Directive 12.3 requires that the NRC use OPM to conduct investigations for clearances involving access to classified materials, but does not require OPM be involved in investigations relating to Atomic Energy Act Section 145b preappointment investigation waivers.³³ The Section 145b waiver program, like the scheme for

²⁹ NEI Response to Questions at 3.

³⁰ NRC Staff Response to Questions at 14.

³¹ Id. at 4.

³² See 5 C.F.R. § 736.201.

³³ See NRC Management Directive 12.3 (April 27, 2004) at Exhibit 6, ADAMS Accession No. ML041770520. Additionally, what the Board believes to be the current interagency agreement between OPM and NRC regarding investigations carries no restrictions upon NRC's ability to use private contractors for determining access to sensitive unclassified information. See Special Agreement Between OPM-Office of Federal Investigations (OFI) and the Nuclear Regulatory Commission (NRC) (March 9, 1988); see also Agreement [between OPM and NRC] (Nov. 3, 1982).

HLW participants in Proposed 10 C.F.R. § 73.22(b)(1)-(2), allows access to SGI (as well as proprietary and Official Use Only information).³⁴ It is the Board's understanding that a private contractor is used to "process the 145b requests (pre-screen and conduct on-line credit, NCIC, PIPS, DCII checks and additional checks, as required)."³⁵

Nor does the Board find persuasive the Staff's assertion that a contract involving less than one million dollars cannot be put in place in fewer than four months. The Board entertains no serious doubt that, should the Commission direct it, such a contract could be put in place in much less time than that estimated by the Staff. In any event, even if it takes four months to hire such a contractor, it would be well worth it. Securing a contractor to process background checks in two weeks would result in an enormous time savings and avoid delays over the life of the HLW proceeding. Any additional costs over the current fee of \$172.50 charged by the Staff can be absorbed by the NRC or passed on to non-indigent potential parties.

In sum, the Staff's proposed method of using OPM for conducting background checks for SGI access likely will cause considerable and continuing delays, as well as other disruptions, in the HLW proceeding. In stark contrast, NRC licensees currently conduct essentially the same background check using private contractors in a fraction of the time it takes OPM. Using a private contractor and conducting the background check and fingerprint review in the

³⁴ NRC Management Directive 12.3 (April 27, 2004) at Exhibit 6, ADAMS Accession No. ML041770520.

³⁵ Contract No. NRC-10-06-401 (effective July 5, 2006) at Section C.3.1, ADAMS Accession No. ML062000723.

estimated two weeks, even if the trustworthiness and reliability and need to know determinations by the Staff were not speeded up, would present no scheduling difficulties that cannot be easily accommodated. The Pre-License Application Board calls this matter to the attention of the Commission so that it might take whatever action it deems appropriate.

The Pre-license Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Alex S. Karlin
ADMINISTRATIVE JUDGE

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 31, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. PAPO-00
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(High-Level Waste Repository: Pre-Application Matters))	ASLBP No. 04-829-01-PAPO
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NRC STAFF RESPONSE TO
PAPO BOARD QUESTIONS DATED JULY 6, 2007

INTRODUCTION

On July 6, 2007, the Pre-License Application Presiding Officer (PAPO) Board issued a series of questions to the NRC staff ("Staff"), the Nuclear Energy Institute (NEI), and the State of Nevada ("State") concerning access to safeguards information (SGI) in the high-level waste (HLW) proceeding. The Staff's responses to questions 2 through 6 follow.

RESPONSE TO PAPO BOARD'S QUESTIONS

Pursuant to the July 6, 2007 Order, each question is restated below, followed by the Staff's answer. Because they were directed at parties other than the Staff, Questions 1 and 4.a. have been omitted.

2. Background Investigations under 10 C.F.R. § 73.56(b) and SGI Access in HLW

Section 73.56(b)(2)(i) states that the "background investigation" required for unescorted access to a licensee's facility must "[a]s a minimum, . . . verify an individual's true identity, and develop information concerning an individual's employment history, education history, credit history, criminal history, military service, and verify an individual's character and reputation." The proposed rule regarding access to safeguards information contains a similar definition for the term "background check," stating that it "includes, at a minimum, a criminal history check, verification of identity, employment history, education, and personal references." 71 Fed. Reg. at 64,059 (Proposed 10 C.F.R. § 73.2). Recognizing that the two processes might not be identical and that the Staff might be required to apply two different standards, nevertheless, it appears that there are great similarities between the two.

- a. Based on the Staff's understanding of applicants' background investigation process, is the time required to perform the background check for access to SGI (i.e., 4 to 6 months) similar to the amount of time required to perform the "background investigation" in § 73.56?

It is the Staff's understanding that the licensees are able to complete the background investigation required by 10 C.F.R. § 73.56 for unescorted access to nuclear power plants in approximately two weeks.

- b. If the time required to perform the background check under the proposed rule for access to SGI is greater than the time required to perform "background investigations" under § 73.56, explain why.

The main driving factor in the NRC's estimated completion time for background checks is the time required by OPM to actually complete investigations and return the results to the NRC. OPM is responsible for conducting background investigations for almost all federal government agencies, and is responsible for setting its own priorities for its workload.

- c. Could the 10 C.F.R. § 73.56(b)(2)(i) background investigation process be used as a model for processing HLW proceeding participants?

The requirements of 10 C.F.R. § 73.56(b)(2)(i) overlap with the requirements for background checks under the proposed rule. The proposed rule would require that background checks, at a minimum, include a criminal history check, verification of identity, employment history, education, and personal references. In addition to the psychological assessment and behavior observation requirements, a background investigation pursuant to 10 C.F.R. § 73.56(b)(2) must verify the individual's identity "and develop information concerning an individual's employment history, education history, credit history, criminal history, military service, and verify an individual's character and reputation." In order to conduct the background investigation, and in accordance with 10 C.F.R. § 73.57, the licensees submit fingerprints for each employee to the NRC. The NRC transmits these fingerprints to the FBI for a criminal history check, and transmits the results of the criminal history check to the licensees. The

licensees then complete the remainder of the background investigation. This background investigation gathers information with regard to licensee employees that is similar to the information that the Staff intends to gather through OPM under the proposed rule with regard to individuals seeking access to SGI in the HLW proceeding. Once the background investigation is complete, the licensee makes a determination as to whether the individual is trustworthy and reliable. This is the same determination that the Staff would make after receiving the completed results of a background check under the proposed rule. To the extent that the information to be collected and the determination that will be made based on that information are the same, the background investigation process conducted pursuant to § 73.56(b)(2)(i) could be used as a model to develop a background check process for HLW proceeding participants that would comply with the proposed rule regarding access to SGI. The Staff, however, intends to use OPM to complete background checks under the proposed rule, and does not set OPM's priorities.

d. How could the background investigation process be used as a model?

Each licensee has developed its own program and procedures for implementing the requirements of 10 C.F.R. § 73.56(b)(2). Licensees use guidance developed by the Nuclear Energy Institute (NEI) and endorsed by the NRC to design their programs and procedures. Although the Staff anticipates conducting all background checks to be required under proposed 10 C.F.R. § 73.22, the proposed rule provides that access to SGI may be granted based on either "a background check or other means approved by the Commission." "Protection of Safeguards Information," 71 Fed. Reg. 64004, 64061 (proposed Oct. 31, 2006) (to be codified at 10 C.F.R. § 73.22(b)(2)). Thus, an organization wishing to conduct its own background checks for access to SGI under the proposed rules, such as a state, could develop its own program and procedures meeting the requirements of the proposed rule and, after receiving Commission

approval, conduct background checks. Such an organization could use NEI's guidance as a model when developing its own program and procedures for background checks that would comply with the requirements of the proposed rule.

- e. Can the Staff commit to processing HLW participant fingerprint reviews in the same amount of time it takes to process licensee fingerprint reviews (ideally, 72 hours)?

The Staff could employ the same procedure for processing licensee fingerprints and HLW participant fingerprints. The fingerprints must first be submitted to the Staff, and then the Staff would submit the fingerprints to the FBI. Thus, the processing time would be roughly the same for both HLW participants and licensees. However, the FBI charges a fee for each set of fingerprints checked (currently, \$27). This charge would be in addition to the charge for a full background check conducted by OPM, which includes a fingerprint check. Because of the extra cost of obtaining an additional fingerprint check directly from the FBI, the Staff intends to process HLW participant fingerprints through the OPM background check.

- f. Other than the additional requirements of 10 C.F.R. § 73.56(b)(2)(ii) & (iii) (requiring a psychological assessment and behavioral observation), how is the background investigation process different than processing potential parties in the HLW proceeding?

As discussed above in the response to part (c), other than the requirements for a psychological assessment and behavioral observation, the information to be gathered under § 73.56(b)(2) and the proposed rule for access to SGI are similar, and both reviews are conducted to determine whether the individual being investigated is trustworthy and reliable. However, "background investigations under [10 C.F.R. § 73.56] are arguably more comprehensive" than the background checks required by the proposed rule. 71 Fed. Reg. 64012. There is also a procedural difference between the two programs. The licensees have developed their own background investigation program, but the NRC intends to process

background checks for potential HLW proceeding participants through OPM.

3. Time Estimates for Background Checks Under the Proposed Safeguards Rule

At the May 30, 2007, case management conference, the NRC Staff estimated that it will take between four and six months to complete an entire background check and determination regarding the trustworthiness and reliability of each United States citizen who applies for access to SGI. See Tr. at 1126, 1160-61. After probing from the Board, the Staff elaborated further regarding the process and time estimates. The Staff stated that after a requestor submits to the NRC a complete package of required forms (fingerprint cards, a credit history release form, and Standard Form - 85) and two forms of identification, the NRC would send the entire package to the Office of Personnel Management (OPM) for processing. Tr. at 1140-141. From this point, the Staff indicated that it would expect an initial product from OPM regarding the results of the fingerprint criminal history check in approximately 40 days. Tr. at 1141. From this point forward, the Staff waits for the results of OPM's complete background investigation on the "entire package," which could take 3 to 5 months on average. Tr. at 1166. The Staff further represented that, after receiving the final package from OPM, the Office of Administration would take "between 20 to 30 days" to make a determination with regard to the trustworthiness and reliability of the requestor. Tr. at 1164-165.

a. Initiation of Background Check and Process

- i. How long will it take the NRC to submit a complete package submitted by a requestor to OPM?

When the NRC receives a complete package from a background check requestor and payment for the investigation, the Staff must first process the payment and take appropriate accounting actions. The Staff will then screen the SF-85 to ensure that it is complete. If the SF-85 has been completed correctly, the Staff intends to forward the entire package to OPM. This process takes approximately 5 working days.

- ii. Are there any intermediate steps, or does the Staff immediately forward the package to OPM?

As explained above, the Staff must first process the payment for the background check and then will screen the package to ensure that the SF-85 is complete before forwarding the package to OPM.

iii. After the NRC receives the results of the initial criminal history check from OPM, how long will it take the NRC to inform a requestor as to the results of that check?

As stated during the May 23, 2007 case management conference, the Staff will receive a preliminary report, including the results of the fingerprint check, from OPM approximately 40 days after submitting the background check request to OPM. Tr. at 1141. The Staff will only notify the requester if the results of the criminal history check are positive (the criminal history check shows one or more arrests), and additional information is needed to mitigate the results of the check. In the case of positive results, the requestor will be contacted within 3 to 5 working days of the NRC's receipt of the results of the criminal history check. This process is in addition to the individual's right pursuant to 10 C.F.R. § 73.57(e) to challenge the information obtained through the background check or the Staff's final determination as to whether the individual is trustworthy and reliable and will take place while the Staff is awaiting the results of the full background checks conducted by OPM, which will include personal reference checks.

iv. At the case management conference the Staff stated that a requestor will be required to submit paper fingerprint cards. May a requestor submit electronic fingerprints?

The Staff does not have the capability to receive electronic fingerprints from entities other than power reactor licensees. The Staff has established electronic links with OPM and the FBI for the purpose of submitting fingerprints for criminal history checks. Due to the high volume of criminal history check requests received from power reactor licensees, the Staff has also established electronic links with power reactor licensees to transmit fingerprints, but has not established electronic links with any non-power reactor licensees or any non-licensees because of the lower volume of requests.

v. Would the use of electronic fingerprint processing, instead of paper cards, expedite the process?

Even if the NRC were able to accept electronic fingerprints from requestors, no time would be saved overall. As explained above in the response to question 3.a.i., the Staff does not intend to transmit the background check package, including the fingerprint cards, to OPM until the Staff has received and processed the appropriate payment from the requestor and screened the SF 85 form to ensure that it is complete.

b. Trustworthiness and Reliability Determinations

i. Is there a formal practice by which the NRC Office of Administration, which makes determinations of trustworthiness and reliability, prioritizes its workload?

The Commission mandates certain priorities for the Office of Administration. For example, new employees to NRC are to be given the highest priority. To the extent that doing so will not conflict with other priorities mandated by the Commission, the Staff will attempt to prioritize background investigations for the HLW proceeding and complete them as quickly as possible.

ii. Do they simply apply a first-in first-out method?

The initial package screening and transmission to OPM described in the response to question 3.a. is completed first-in first out. Once the Staff receives the results of each background check from OPM, the Staff will adjudicate the request, that is, will determine whether the individual requesting access is trustworthy and reliable, based on the information received from OPM. The adjudications of information revealed by background checks are prioritized, as discussed in the response above, based on mandates from the Commission and any other Office of Administration policies. The Office of Administration, as part of its office policies, commits to prioritizing the HLW investigations and completing them as quickly as possible.

iii. Will the Office of Administration employ decision-makers to make determinations on trustworthiness and reliability for access to SGI separate from decision-makers who act on NRC employment and security clearance determinations?

No, at this point in time, the Office of Administration does not have resources available to dedicate personnel solely to SGI access requests in the HLW proceeding.

iv. Will SGI request determinations be processed with other determinations, including security clearances (i.e., will SGI determinations be placed in the same pile as all other files)?

The SGI requests associated with the HLW proceeding will be processed along with other security clearance requests, but, as indicated above, the Staff will incorporate these requests with other high priority items.

v. Because the NRC will be confronted with only a limited number of background checks for adjudicatory participants seeking access to SGI and the NRC will have advance notice regarding the exact number of background checks and the dates submitted, is there any reason that would, once the Office of Administration receives a final product from OPM, prevent the NRC from prioritizing determinations for those adjudicatory participants?

As discussed in the response to question 3b.i., the Commission has mandated certain priorities for the Office of Administration. However, to the extent that doing so will not conflict with Commission mandate, the Office will process SGI access requests in the HLW proceeding along with its other higher-priority actions.

4. Foreign Nations and Background Checks Under the Proposed SGI Rule

At prior case management conferences, the State of Nevada indicated that some number of its experts, which might require access to SGI, are foreign nationals. Tr. at 740-741, 1183. Because the proposed rule does not expressly address procedures to be followed with respect to foreign nationals and access to SGI, Nevada's experts present unique circumstances that must be anticipated and preemptively addressed so that this proceeding may move forward in an efficient and expeditious manner.

b. Under the NRC's arrangement, contract or otherwise, with OPM, will OPM be responsible for conducting the background checks of non-resident foreign nationals? If not, what entity will conduct such background checks? Will OPM be

responsible for conducting the background checks of U.S. resident foreign nationals?

The Staff is researching whether background checks for non-resident foreign nationals can be accomplished in a manner that meets minimum requirements of the proposed rule and will provide the Staff with sufficient information to make determinations with regard to the trustworthiness and reliability of non-resident foreign nationals. To this end, the Staff is working with OPM and the State Department to try to develop an interagency agreement for background checks of non-resident foreign nationals seeking access to SGI. Although the PAPO Board has not specifically inquired about the process for conducting background checks for U.S. resident foreign nationals, it is possible that at some point in the proceeding a background check will be required for such an individual. Thus, the Staff's discussions with OPM and the State Department include the process for conducting these background checks.

- c. With respect to (1) citizens of the United Kingdom, and (2) citizens from any other country identified by Nevada in Question 4.a. as the country of citizenship or residence of one or more of its relevant experts:
 - i. Provide the Staff's best estimate of the time required to process the fingerprints and initial information.

The Staff intends to complete the initial package screening for resident foreign nationals in the same amount of time as for resident U.S. citizens, that is, the complete package would be transmitted to OPM within five working days after the NRC receives the complete package from the individual requesting access to SGI. However, it may take the Staff longer to process packages from non-resident foreign nationals. More precise information on the amount of time necessary to process those packages will be available if the NRC, OPM, and the State Department are able to enter into an interagency agreement with regard to background checks for non-resident foreign nationals. The Staff will provide an update to the PAPO and participants as soon as further information is available.

- ii. Provide the Staff's best estimate of the time required for the NRC to transmit this information to OPM, or other responsible entity.

As discussed above, the Staff will make an effort to transmit information for non-resident foreign nationals to OPM, the State Department, or another responsible entity within the same amount of time that information for U.S. citizens would be transmitted to OPM. At this time, the Staff does not have a firm estimate of the time required, but this issue is part of the Staff's ongoing discussions with OPM and the State Department.

- iii. Is this transmittal done by a federal employee or a contractor?

Information will be transmitted to OPM and/or the State Department by an NRC employee.

- iv. If a contractor is involved in this transmission process, does the contract contain any time limits for such transmissions?

Because all information will be transmitted by NRC employees, this question is not applicable.

- v. Provide the Staff's best estimate of the time required for OPM, or other responsible entity, to conduct the background investigation.

Background checks for non-resident foreign nationals or resident foreign nationals who have only lived in the United States for a short period of time (less than five years) will require coordination between OPM and the State Department and therefore the entire process may require more time to complete than for U.S. citizens. The Staff will have a better estimate of the time needed to perform background checks on non-resident foreign nationals after its discussions with the State Department and OPM conclude. The Staff will update the PAPO and the participants as soon as an estimate is available.

vi. Provide the Staff's best estimate of the time required for the NRC, once it has received any and all information from OPM, or other responsible entity, to make a determination of trustworthiness and reliability.

Once the Staff receives the complete results of the background investigation on any applicant, regardless of citizenship or country of residence, from OPM or the State Department, the Staff will make a determination on the individual's trustworthiness and reliability within 20 to 30 days.

- d. Other than the prompt submission of a request for a pre-clearance, Tr. at 1060-61, are there any steps that a non-citizen seeking access to SGI can take to expedite the process?

The Staff is not aware of any at this time, but will notify the PAPO and the participants if the State Department identifies any steps that a non-resident foreign national can take to expedite their background check. All individuals seeking access to SGI, regardless of their citizenship or country of residence, can expedite their background check by notifying any individuals they list as references that they may be contacted by a federal agent and by encouraging their references to respond to inquiries from OPM or the State Department promptly.

5. OPM and Background Checks Under the Proposed SGI Rule

At the May 30 case management conference, the Staff indicated that because the background checks are to be conducted by OPM, the time it takes to complete a background check is out of its hands. See Tr. at 1131-1132.

- a. NRC's arrangement with OPM
 - i. Has the Staff entered into a contract with OPM specifically dealing with the performance of background checks for access to safeguards information by NRC adjudication participants?

No contract is necessary because the NRC has an interagency agreement with OPM under which OPM will perform all types of background checks required by the NRC and the Staff intends to proceed under the existing agreement.

ii. If not, what is the vehicle by which NRC utilizes OPM's services to conduct such checks?

As stated above, the NRC and OPM have a long-standing interagency agreement covering background checks.

b. Contract or Agreement Obligations

i. Does the NRC's contract or other applicable arrangement (as specified in Question 5.a.ii.) with OPM contain any provisions requiring that background checks be performed in a specified amount of time?

The interagency agreement does not contain any provision requiring that background checks be performed in a specified amount of time.

ii. Does the NRC's contract or other applicable agreement with OPM provide any enforceable benchmarks for performance of a background check?

No, the interagency agreement does not provide any enforceable benchmarks for performance of a background check.

iii. If so, what are those benchmarks or timetables?

Because the agreement does not provide any enforceable benchmarks for performance of a background check, this question is not applicable.

c. Does the NRC have any recourse if a background investigation were to be unreasonably delayed?

If an investigation were unreasonably delayed, the Staff will contact OPM and attempt to resolve the delay at the staff level. If this effort were unsuccessful, the issue will be elevated to OPM management.

d. Does the NRC's contract or other applicable agreement provide for the availability of expedited processing of specific classes of background checks, such as those checks for NRC adjudication participants?

Certain background investigations, such as investigations based on Standard Form 86, can be expedited for an additional payment. However, as indicated previously, the NRC will use

the SF-85 form for background checks related to the HLW proceeding. An investigation using the SF-85 cannot be expedited.

e. Nature of NRC's Contract or Agreement with OPM

i. Is the NRC's contract or other applicable agreement with OPM regarding the performance of background checks for access to SGI, related to, negotiated in concert with, or part of the NRC's contract with OPM to perform background checks for NRC employment and/or NRC employee security clearances?

The NRC and OPM have a single interagency agreement that covers all background investigations, including background checks for access to SGI, background checks for NRC employment, and security clearance investigations.

ii. If so, does the NRC have the ability to prioritize the checks being performed by OPM?

As indicated in the response to question 5.d., for the type of background check to be completed for access to SGI, the NRC cannot prioritize non-expedited checks being performed by OPM.

iii. May the NRC require OPM to process a specific check or type of check before others?

No, the NRC does not have the authority to require that OPM process a specific background check or type of background check before others.

iv. Has the NRC's contract or other applicable arrangement with OPM with regard to background checks for access to SGI been finalized?

The NRC intends to submit background check requests for access to SGI pursuant to the current interagency agreement between the NRC and OPM, which has been in place for many years.

v. If not, are there provisions the NRC might include so that the processing of background checks for access to SGI in the High-level Waste proceeding can proceed in an efficient and expeditious manner?

As the background checks will be processed pursuant to the current interagency agreement, this question is not applicable.

6. The Use of Contractors, Besides OPM, to Perform Background Investigations

At the May 30, 2007, case management conference, the Staff suggested to the Board that despite the 4 to 6 month turnaround time for background checks there were no reasonable alternatives to the use of OPM because if "[the Staff] attempted to contract it out separately . . . [it] would actually be longer to put a contract in place to get a different organization." Tr. at 1131. At the case management conference the Staff stated that the total cost of each individual background check is \$172.50. Tr. at 1145. As we noted above, the number of possible requestors of SGI that have demonstrated a need to know and require a background check in this proceeding and future COL proceedings is limited. Accordingly, the total value of a contract to perform background checks in the HLW proceeding and future COL proceedings would fall far below \$1 million in value. With the preceding in mind, the Staff shall answer the following questions:

- a. If ordered by the Commission, what is the shortest period of time required to put a contract worth less than \$1 million to conduct background checks for HLW adjudication participants into place.

The Staff's best estimate of the shortest period of time required to put a contract worth less than \$1 million to conduct background checks for HLW adjudication participants into place is four months.

- b. Are there any existing contracts that could be modified to include conducting background checks for HLW adjudication participants?

Because the NRC conducts all of its background investigations through OPM, the NRC has no existing contracts that could be modified to include conducting background checks for HLW adjudication participants.

- c. Under such a contract, what is the shortest period of time in which a background check and determination regarding trustworthiness and reliability could be completed?

Assuming that the NRC could enter into a contract for the completion of background

investigations, based on the data the Staff has obtained on power reactor licensee background investigation programs, it is possible that the investigation portion could be completed in two weeks. A determination with regard to the individual's trustworthiness and reliability would be made within 20 to 30 days.

CONCLUSION

The above constitutes the Staff's response to the questions posed in the PAPO Board's July 6, 2007 Order.

Respectfully submitted,

/RA/
Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
This 31st day of July, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High-Level Waste Repository:
Pre-Application Matters))

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

RESPONSE OF THE NUCLEAR ENERGY INSTITUTE TO
THE BOARD'S JULY 6, 2007 ORDER

By Order dated July 6, 2007, the Pre-License Application Presiding Officer (PAPO) Board posed a number of questions to the Nuclear Energy Institute (NEI) in its capacity as a potential party.¹ NEI hereby files its answers to those questions.

1. a. 10 C.F.R. § 73.56(b)(2)(i) Process

i. Explain the process by which the background investigations under 10 C.F.R. § 73.56(b)(2)(i) are conducted.

The process is set forth in NEI 03-01, Rev. 1, *Nuclear Power Plant Access Authorization Program* (April 2004). Applicants for an initial unescorted access undergo a background investigation for the preceding three years, or since the eighteenth birthday if the individual is younger than twenty-one years of age. With respect to the elements of investigations enumerated in 10 C.F.R. § 73.56(b)(2)(i), the following steps are accomplished:

1. An extensive Personal History Questionnaire and Self-Disclosure are completed by the individual. This form includes topics such as employment history, education history, credit history, criminal history, military service, and references.
2. The true identity of the applicant is verified, e.g., by comparing a government-issued photo identification with the physical characteristics of the applicant.

¹ The July 6, 2007 Order was issued by a majority. On July 16, Board member Alex S. Karlin filed a Dissent.

3. The previous three-year employment/unemployment history of the applicant is verified in accordance with the following instructions:
 - a) For the most recent year preceding the application, conduct a suitable inquiry on a best effort basis and verify every claimed employment (regardless of length) and verify each unemployment period of 30 days or more.
 - b) For the remaining two years of the required three-year period, conduct a suitable inquiry on a best effort basis and verify the longest claimed period of employment in any calendar month and verify each period of unemployment of 30 days or more.
 - c) If active military service is contained within the individual's background during the past three-year period, verify the period and character of service.
 - d) If educational activities are claimed in lieu of employment, verify enrollment.
4. A credit history check is performed, typically through a national credit-reporting agency, and reviewed for the duration of history provided by the applicant. The check includes an inquiry to detect potential fraud or misuse of social security numbers or other financial identifiers.
5. A criminal history check is conducted and evaluation performed consistent with the process set for in 10 C.F.R. § 73.57.
6. The character and reputation of the applicant are verified through at least two developed references.
7. Drug and alcohol tests are verified as negative.

ii. Identify the Staff's responsibilities in the process and responsibilities performed wholly by the Licensee and/or NEI.

The NRC Staff is generally not directly involved in the industry authorization process except for fingerprint review. (See the response to question 1.b.iii).

iii. What guidance has the Staff provided regarding how the investigation should be conducted? Provide a copy of any guidance.

The Staff has endorsed NEI 03-01, Rev. 1, *Nuclear Power Plant Access Authorization Program* (April 2004). See generally <http://www.nrc.gov/reactors/operating/ops-experience/access-authorization.html>

- iv. Is the Licensee permitted to utilize outside contractors in the conduct of background investigations?**
- 1) **If so, to what extent?**
 - 2) **What functions may an outside contractor perform?**
 - 3) **Must the Licensee make the final determination with respect to the background investigation?**

4) Approximately how many companies perform these background checks on behalf of Licensees or assist Licensees in the process?

Licensees utilize outside contractors to varying degrees in performing background investigations. Except as effectively precluded by the provisions of 10 C.F.R. § 73.57 pertaining to criminal history checks, contractors may be involved in any of the elements of investigations enumerated in 10 C.F.R. § 73.56(b)(2)(i). However, in all cases the Licensee is responsible for the ultimate determination concerning whether or not to authorize unescorted access. Approximately 15 primary investigation companies are utilized by Licensees.

1. b. 10 C.F.R. § 73.56(b)(2)(i) Time-lines

- i. How long does it take to complete an average background investigation (which excludes the other requirements of 10 C.F.R. § 73.56(b)(2), such as psychological tests) for a new employee (i.e. an employee who has not been employed previously by a Licensee of the NRC) who is a U.S. citizen? If NEI is unable to provide an average time estimate, provide a range of time estimate.**

It generally takes three to five days to complete all of the elements of background investigations for a new employee. Employment history and reference checks performed in verifying an individual's character and reputation typically control the total time necessary to complete an investigation. Other aspects are typically completed within 72 hours.

- ii. Are the investigations comprised of multiple components? (i.e. criminal history, employment history, character). If so, how long does each component take to complete?**

Yes, investigations are comprised of multiple elements. See responses to questions 1.a.i and 1.b.i.

- iii. The NRC has stated that its goal is a "72-hour turnaround" for Licensee fingerprint reviews. In the view of NEI, has the Staff achieved this goal? If not, what is the approximate length of a fingerprint review submitted today? [Reference omitted.]**

The NRC Staff has generally been successful in meeting a "72-hour turnaround" goal, often completing the review in a period as short as twelve hours.

- iv. If any portion of the investigation is performed by a contractor, provide a brief description of each such component and the typical time required for the completion of such component.**

See responses to questions 1.a.iv and 1.b.i.

- 1. c. How long does it take to complete an average background investigation for a new employee who is a foreign national? If NEI is unable to provide an average time estimate, provide a range of time estimate for each investigation component.**

The process described in the response to question 1.a.i is also applied to foreign nationals. It generally takes seven to nine days to complete a background investigation.

1. d. **Do Licensees have a process for expedited background investigations? If so, explain the process and provide an estimate of time required to perform an expedited review.**

NEI is not aware of a process for expedited background investigations.

Respectfully submitted,



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July 30, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. PAPO-00
)
)
(High-Level Waste Repository:)
Pre-Application Matters))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PAPO BOARD MEMORANDUM have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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Docket No. PAPO-00

6

PAPO BOARD MEMORANDUM

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this 31st day of August 2007